

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHAD C. WING</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket No. 190,090
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant appeals an Award dated September 24, 1996, entered by Special Administrative Law Judge Michael T. Harris. Jeff K. Cooper has been appointed Board Member Pro Tem for this case to serve in place of Gary M. Korte who has recused himself from this proceeding.

**APPEARANCES**

The claimant appeared by his attorney, Diane F. Barger of Wichita, Kansas. Respondent appeared by its attorney, Tina M. Sabag of Dakota City, Nebraska. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board reviewed the record and adopted the stipulations listed in the Award. The Appeals Board also considered the July 11, 1995, deposition of Domingo Anthony and the July 12, 1995, deposition of Bud Langston.

**ISSUES**

1. Nature and extent of disability, including whether claimant's injury should be compensated as a scheduled injury or as an injury to the body as a whole.
2. Average weekly wage.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The claimant began working for the respondent on May 21, 1991. At the time of his hiring, the claimant advised the respondent that he had preexisting knots on his right middle finger and left knee. Following his employment, claimant worked a job for the respondent which required use of a hook in his left hand and knife in his right hand. Claimant testified that the bump on his right hand began growing and causing him pain and discomfort when he struck the knot on the table and also had pain and difficulty with the tight grip required by the job. Claimant alleges the activities he performed at work constituted a series of injuries from June of 1991 through April 2, 1994. Claimant testified that when he started to work, the bumps were small and asymptomatic. However, as he continued working in the cold environment and gripping the knife, he began developing larger and additional knots and symptomatology. Claimant reported the problem to the company nurse.

Claimant was initially seen by Dr. K. William Bruner in July of 1991 who referred him to board-certified internist Vijay R. Mhatre, M.D., in August of 1991. Claimant continued to work and had pain in his right hand. Claimant testified that as he continued to work the nodule grew in size and the pain became worse.

Claimant further testified that as he continued to work the nodule in his knee also started causing him discomfort. Claimant testified that before working at IBP the nodules had not caused him any difficulty and were not painful. Claimant continued working at IBP and his job was changed to pulling tenders. In the pulling tenders job, claimant testified he bumped his fingers on bones in the pieces of meat that caused him additional symptomatology. Claimant testified that he requested a change of duties into maintenance; however, he was never changed to maintenance or provided an accommodated job. Claimant was ultimately terminated from his employment on April 2, 1994. The reason claimant was terminated was for not clocking out at the end of his shift.

Dr. Mhatre testified the claimant suffered from rheumatoid nodulosis. Dr. Mhatre testified that the work activities performed by the claimant caused the rheumatoid nodulosis to become symptomatic. Dr. Mhatre testified further that the rheumatoid nodulosis does not usually become symptomatic unless exposed to repetitive trauma and exposed to cold. Dr. Mhatre's treatment focused on the right-hand pain which is consistent with claimant's complaints as voiced at the regular hearing. The records of Dr. Mhatre also indicate that claimant advised the doctor that his symptoms had been getting worse over the last three years. Since claimant has been off work from IBP his symptoms have diminished.

Board-certified orthopedic surgeon Sergio Delgado, M.D., also testified that claimant's preexisting condition in his hand was aggravated by the work for the respondent; however, he did not feel that the left-knee problems were related to the work environment and did not rate the left knee. Dr. Delgado testified that most likely the increased symptoms and growth of the nodules were related to his work at IBP and made symptomatic by tendonitis. Nevertheless, no permanent impairment was assessed by Dr. Delgado for the

knee condition. Although he found tendinitis in both arms, Dr. Delgado assigned a permanent impairment of function rating to the right-upper extremity only.

When considering the record in whole, the Board finds that the claimant has met his burden of proof to show that he met with personal injury by accident arising out of and in the course of his employment by a series of accidents ending on or about April 2, 1994. Claimant has alleged personal injury by accident and not occupational disease. The Board finds that the claimant met with personal injury by accident and not an occupational disease. Based upon Dr. Delgado's rating and the testimony of Dr. Delgado and Dr. Mhatre, the Board finds that claimant is entitled to 12 percent loss of use to the right upper extremity at the level of the forearm caused by the aggravation of the preexisting condition.

The Board finds that neither doctor issued a rating for the lower extremity, and Dr. Delgado testified that any problems relating to the lower extremity were not work related. Based on the testimony of the physicians, the Board finds that the nature and extent of disability should be limited to the right-upper extremity.

Without explanation, the Administrative Law Judge found claimant's average weekly wage to be \$469.67. Claimant disagrees with that finding contending that the average weekly wage should have been \$651.12 when determined by using a six-day work week, citing Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). Respondent argues Tovar does not apply to the facts of this case and that the finding by the Administrative Law Judge should be modified to find an average weekly wage of \$423.34.

The Appeals Board agrees with respondent's analysis. The facts in this case are materially different from the facts relied upon by the Court in Tovar to support a 48-hour work week. The Court found that Miguel Tovar actually worked most Saturdays in addition to his regular 40-hour work week Monday through Friday. In this case, even if claimant was expected to be available to work on Saturdays if he should be scheduled to do so, claimant actually worked few, if any, Saturdays. Claimant worked very little overtime. It cannot be determined from the record how much of the overtime claimant did work was on Saturday. Accordingly, claimant's average weekly wage should be calculated pursuant to K.S.A. 44-511(b)(4) based upon a 40-hour work week at \$9.67 per hour for \$386.80 in straight-time regular wages, plus average weekly overtime of \$16.86; average other pay of \$4.66 per week; average insurance of \$8.26 per week; and an average bonus of \$6.76 per week for a total gross average weekly wage of \$423.34.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris, dated September 24, 1996, should be, and the same is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Chad C. Wing, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred in a series of accidents ending on or about April 2, 1994, and based upon an average weekly wage of \$423.34 for 24 weeks at the rate of \$282.24 per week or \$6,773.76, for a 12% permanent partial scheduled injury to the forearm, making a total award of \$6,773.76.

The Appeals Board otherwise affirms and adopts the remaining orders of the Special Administrative Law Judge as set forth in the Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1997.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Tina M. Sabag, Dakota City, NE  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director